

DPI initially argued that it should receive the full value of the cashback promotion and that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. For example, if AT&T Kentucky offers retail service to its customers at \$20.00, it must sell it to dPi at a Commission-mandated discount of 16.79 percent. Therefore, dPi is able to purchase the service at \$16.64. DPI argued, however, that if AT&T Kentucky offered a promotion for a certain monetary value, the discount rate did not apply to the promotional price. For example, if AT&T Kentucky offered a cashback promotion of \$50.00, it must offer dPi a credit for the whole \$50.00 and not reduce that \$50.00 by the wholesale discount.

The Commission found that any promotional discounts should be adjusted by the wholesale discount and to adopt dPi's position would be to put AT&T Kentucky in the position of paying its competitors to "purchase" AT&T Kentucky's service. The Commission concluded that such a result was absurd and would lead to an anticompetitive environment. The Commission, therefore, ordered that any promotional discount must be reduced by the wholesale discount.

dPi's Argument

DPI argues that the calculation the Commission adopted in its Order "conflicts with federal law and regulations because it violates the core principle of the Telecommunications Act that wholesale pricing should always reflect a price below retail."¹ DPI asserts that applicable federal statutes and regulations require that resale rates be lower than wholesale rates in order to promote competition. DPI also asserts

¹ Motion for Rehearing at 4.

that the FCC, in the Local Competition Order,² also indicated that the wholesale price should be below retail prices, and that promotions cannot be used to circumvent the rule. DPi also relies upon the decision in the Sanford³ case out of the Fourth Circuit Court of Appeals. DPi argues that, in Sandford, the Fourth Circuit determined that, “wholesale must be less than retail,” and that the Commission’s Order turns the Sanford reasoning on its head. DPi raises several other arguments, none of which are new, all arguing that wholesale rates must always be lower than retail rates.

Discussion

KRS 278.400 contains the standard for the Commission to grant rehearing. If the rehearing is granted, any party “may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” KRS 278.400. The Commission may also take the opportunity to address any alleged errors or omissions.

DPi has not raised any new arguments in its Motion for Rehearing. Its motion is a recitation of the arguments that it presented in its complaint, in filed testimony, at oral argument and in its post-hearing briefs. The Commission considered all of dPi’s arguments that the cashback promotion should not be discounted by the wholesale discount, and rejected them. DPi has presented no compelling argument, produced no new evidence, and pointed to no omissions or errors in the Commission’s Order that warrant granting rehearing.

² In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 (rel. Aug. 8, 1996).

³ BellSouth Telecom. Inc. v. Sanford, 494 F.3d 439 (4th Cir. 2007).

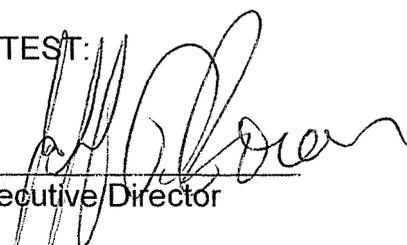
Even assuming that dPi's Motion for Rehearing had some merit, a recent court decision further supports the Commission's decision to discount the cashback promotion by the wholesale discount. In dPi Teleconnect v. Finley, et al.,⁴ the United States District Court for the Western Division of North Carolina addressed a similar issue to the one that is raised at rehearing -- whether a cashback promotion should be reduced by the wholesale discount when it is provided at retail. The Court, applying the reasoning in Sanford, concluded that, "dPi is entitled only to the difference between the rate that it originally paid and the rate it should have paid to AT&T North Carolina. The rate it should have been charged is the promotional rate available to the retail customers less the wholesale discount for residential services"⁵ The Court's reasoning and conclusion in its Opinion underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order.

Based on the foregoing, IT IS THEREFORE ORDERED that dPi's Motion for Rehearing is DENIED.

By the Commission

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KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:



Executive Director

⁴ dPi Teleconnect LLC v. Finley, (___ F. Supp.2d ___, 2012 WL 580550 (W.D.N.C)). The Order was entered on February 19, 2012, approximately one month after the Commission issued its decision in this case.

⁵ Id. at 3 (Emphasis added.)

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